

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ALLSTATE PROPERTY AND
CASUALTY INSURANCE
COMPANY.

CASE NO. C11-1334JLR

ORDER DENYING SUMMARY JUDGMENT

Plaintiff,

V.

GREGORY STRAND, et al.,

Defendants.

I. INTRODUCTION

17 Plaintiff Allstate Property and Casualty Insurance Company (“Allstate”) seeks a
18 declaratory judgment that it is not obligated to cover the estate of Defendants Michael
19 Hathaway and Teresa Hathaway (collectively, “the Hathaways”) for the claims made
20 against them by Defendants Gregory Strand and Katherine Strand (collectively, “the
21 Strands”). Before the court at this time is Allstate’s motion for summary judgment (Dkt.
22 # 21), arguing that Michael Hathaway’s conduct is not a covered “occurrence” under the

1 Hathaways' insurance policy and is excluded from coverage as an intentional act.
2 Having reviewed the submissions of the parties, the record, and the relevant law, the
3 court DENIES Allstate's motion for summary judgment (SJ Mot. (Dkt. # 21)).

4 **II. BACKGROUND AND PROCEDURAL HISTORY**

5 **A. Tree dispute**

6 Under a view restriction easement that governs the height of trees and other
7 vegetation, adjacent lot owners had a right of entry to the parcel owned by the Strands
8 "for the purpose[s] of trimming, topping, or pruning trees or vegetation." (Amended
9 Compl. (Dkt. # 9) ¶ 10.) The Hathaways owned one of the lots neighboring the Strands'
10 lot. (SJ Mot. (Dkt. # 21) at 3.) In relation to issues with the Hathaways under the
11 easement, the Strands sought a conditional use permit for tree trimming, with an option
12 for removal if certain conditions were met. (Amended Compl. ¶ 11; *see* Strand Ans. ¶
13 11.) With respect to the request for removal of trees, the City of Edmonds Development
14 Services Department "issued 'a permit conditions not satisfied' letter . . . as the trees were
15 located within a geologically hazardous area [and] an environmentally critical area." (*Id.*
16 ¶ 12; *see* Strand Ans. ¶ 12.)

17 On January 24, 2010, Michael Hathaway or his agents entered on the Strand
18 property without the Strands' approval and removed three Douglas fir trees and one
19 Western Red Cedar tree.¹ (*Id.* ¶ 13; *see* Strand Ans. ¶ 13.) During the removal, "at least
20

21 ¹ He may also have removed Black Cottonwood and Red Alder trees. (Amended Compl.
22 ¶ 13.)

1 one tree struck [the Strand] home causing significant damage.” (*Id.* ¶ 14; *see* Strand Ans.
2 ¶ 14.) The removal of the trees also “resulted in soil exposure increases, increased
3 erosion, and other disruptive and/or de-stabilizing activities,” with no remedial measures
4 on the Hathaways’ part. (*Id.* ¶ 15; *see* Strand Ans. ¶ 15.)

5 **B. Insurance Contract**

6 Prior to the tree cutting, Allstate “issued Hathaway a homeowner’s insurance
7 contract, and a personal umbrella insurance contract.” (*Id.* ¶ 5.) Under the homeowner’s
8 policy (“Homeowner’s Policy”), Allstate would “pay damages which an insured person
9 becomes legally obligated to pay because of bodily injury or property damage arising
10 from an occurrence to which this policy applies, and is covered by this part of the
11 policy.” (Foley Dec., Ex. B (Dkt. # 23-2) at 22.) The Homeowner’s Policy defines
12 “occurrence” as

13 an accident, including continuous or repeated exposure to substantially the
14 same general harmful conditions during the policy period, resulting in
bodily injury or property damage.

15 (*Id.* at 3.) Under the personal umbrella policy (“PUP”), “occurrence”
16 means an accident or a continuous exposure to conditions. An occurrence
17 includes personal injury and property damage caused by an insured while
trying to protect persons or property from injury or damage.

18 (Foley Dec., Ex. C (Dkt. # 23-3) at 1-2.)

19 The exclusions section of the Homeowner’s Policy states,

20 We do not cover any . . . property damage intended by, or which may
21 reasonably be expected to result from the intentional . . . acts or omissions
of, any insured person. This exclusion applies even if . . . (b) such . . .
22 property damage is of a different kind or degree than intended or

1 reasonably expected; or (c) such . . . property damage is sustained by a
2 different person than intended or reasonably expected.

3 (Foley Dec., Ex. B at 22.) The general exclusions section of the PUP states,

4 This policy will not apply . . . to any intentionally harmful act or omission
5 of an insured, even if . . . the personal injury or property damage resulting
6 from the act or omission occurs to a person or property other than the
7 person or property to whom the act or omission was intended or is of a
8 different nature or magnitude than was intended.

9 (Foley Dec., Ex. C at 5-6.) Through an endorsement, this exclusion was modified as
10 follows:

11 This policy will not apply . . . to any intentionally harmful act or omission
12 of an insured, even if . . . the personal injury, property damage or bodily
13 injury resulting from the act or omission occurs to a person or property
14 other than the person or property to whom the act or omission was intended
15 or is of a different nature or magnitude than was intended.

16 (Amended Compl. ¶ 18.)

17 **C. Procedural History**

18 On April 7, 2010, the Strands filed an amended complaint against the Hathaways
19 in the Superior Court of the State of Washington for Snohomish County. (*Id.* ¶ 6; see
20 Strand Ans. ¶ 6.) On December 2, 2011, Allstate filed an amended complaint for
21 declaratory judgment in the United States District Court for the Western District of
22 Washington, seeking a judgment that Allstate is not obligated to provide coverage to the
Hathaways in the Strand lawsuit. (Amended Compl. at 8-9.) Allstate asserts that it is not
obligated because the incidents at issue do not qualify as occurrences under the terms of
its contracts with the Hathaways and because the incident falls under the exclusions for
intentional conduct. (*Id.*)

1 On February 23, 2012, Allstate filed a motion for summary judgment, requesting
2 that the court declare that it is not obligated to provide coverage for the Hathaways. (SJ
3 Mot. at 1.)

4 **III. ANALYSIS**

5 **A. Summary Judgment Standard**

6 Summary judgment is proper “if the movant shows that there is no genuine dispute
7 as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R.
8 Civ. P. 56(a). The court draws “all reasonable inferences supported by the evidence in
9 favor of the non-moving party.” *Satey v. JPMorgan Chase & Co.*, 521 F.3d 1087, 1091
10 (9th Cir. 2008) (citations and quotations omitted).

11 The moving party has the initial burden of producing evidence or showing the
12 absence of evidence and the burden of persuasion on the motion. *Nissan Fire & Marine*
13 *Ins. Co. v. Fritz Cos.*, 210 F.3d 1099, 1102 (9th Cir. 2000). The moving party may meet
14 its burden of production by producing “evidence negating an essential element of the
15 nonmoving party’s claim” or by showing “that the nonmoving party does not have
16 enough evidence of an essential element of its claim or defense to carry its ultimate
17 burden of persuasion at trial.” *Id.* at 1106. The moving party must first have “made
18 reasonable efforts . . . to discover whether the nonmoving party has enough evidence to
19 carry its burden of persuasion at trial.” *Id.* at 1105. Then, the moving party “need only
20 point out that there is an absence of evidence to support the nonmoving party’s case.”
21 *Devereaux v. Abbey*, 263 F.3d 1070, 1076 (9th Cir. 2001) (citations and quotations
22 omitted).

1 If the moving party carries its initial burden of production, the nonmoving party
2 “must produce evidence to support its claim or defense.” *Nissan*, 210 F.3d at 1103. The
3 nonmoving party “must provide . . . evidence that set[s] forth specific facts showing that
4 there is a genuine issue for trial.” *Devereaux*, 263 F.3d at 1076 (internal quotations and
5 citations omitted). If the nonmoving party does not “produce enough evidence to create a
6 genuine issue of material fact, the moving party wins the motion for summary judgment.”
7 *Nissan*, 210 F.3d at 1103.

8 **B. Rules of Insurance Policy Interpretation**

9 Under Washington State law, “the interpretation of language in an insurance
10 policy is a matter of law.” *Moeller v. Farmers Ins. Co. of Wash.*, 267 P.3d 998, 1001
11 (Wash. 2011). “If the language in an insurance contract is clear and unambiguous, the
12 court must enforce it as written and may not modify the contract or create ambiguity
13 where none exists.” *Transcon. Ins. Co. v. Wash. Pub. Utils. Dists.’ Util. Sys.*, 760 P.2d
14 337, 340 (Wash. 1988). Nevertheless, “the contract as whole must be read as the average
15 person would read it; it should be given a practical and reasonable rather than a literal
16 interpretation, and not a strained or forced construction leading to absurd results.”
17 *Moeller*, 267 P.3d at 1002 (citations and quotations omitted).

18 A policy is ambiguous, however, “if the *language on its face* is fairly susceptible
19 to two different but reasonable interpretations.” *Kish v. Ins. Co. of N. Am.*, 883 P.2d 308,
20 312 (Wash. 1994) (citations and quotations omitted). In that case, “the court must apply
21 a construction that is most favorable to the insured, even though the insurer may have
22 intended another meaning.” *Vadheim v. Cont’l Ins. Co.*, 734 P.2d 17, 20 (Wash. 1987).

1 Any undefined terms should be “given their ordinary and common meaning, not their
2 legal, technical meaning.” *Moeller*, 267 P.3d at 1002. “Exclusionary clauses are to be
3 most strictly construed against the insurer.” *Vadheim*, 734 P.2d at 20.

4 Analysis of a contract is a two step process. The court first examines the policy
5 provisions to determine if “the loss falls within the scope of the policy’s covered losses.”
6 *Nw. Bedding Co. v. Nat’l Fire Ins. Co. of Hartford*, 225 P.3d 484, 487 (Wash. Ct. App.
7 2010). If the party contesting the denial of coverage shows that the loss is within the
8 scope of covered losses, “[t]he insurer then must show that the claim of loss is excluded.”
9 *Id.*; see also *Hayden v. Mut. of Enumclaw Ins. Co.*, 1 P.3d 1167, 1172 (Wash. 2000).

10 Here, the court will first examine whether the incidents at issue constitute an
11 occurrence under the policy. The court will then examine whether Allstate is relieved of
12 its duty to indemnify because Michael Hathaway’s actions fall under the exclusion for
13 intentional acts.

14 **C. Occurrence**

15 Allstate contends that the losses at issue do not fall under “the scope of the
16 policy’s covered losses,” *Nw. Bedding Co.*, 225 P.3d at 487, because Hathaway’s actions
17 were intentional and therefore cannot be considered an accident and thus an occurrence.
18 (SJ Mot. (Dkt. # 21) at 12.) The Strands argue that the damages occasioned by
19 Hathaway’s conduct constitute an occurrence because his conduct resulted in unintended
20 losses and consequences that are included within the meaning of “accident” under
21 Washington law. (Resp. to SJ Mot. (Dkt. # 25) at 13.)

1 The Homeowner's Policy covers "property damage arising from an occurrence to
2 which [the] policy applies." (Foley Dec., Ex. B at 22.) An occurrence is defined in the
3 Homeowner's Policy as "an accident, including continuous or repeated exposure to
4 substantially the same general harmful conditions." (*Id.* at 3.) Under the PUP, an
5 occurrence is defined as "an accident or a continuous exposure to conditions," including
6 "personal injury and property damage caused by an insured while trying to protect
7 persons or property from injury or damage." (Foley Dec., Ex. C at 1-2.) The term
8 "accident" is not defined in the policy.

9 "Where . . . the word "accident" is not . . . defined in a policy, [Washington State
10 courts] look to . . . common law for definition." *Detweiler v. J.C. Penney Cas. Ins. Co.*,
11 751 P.2d 282, 284 (Wash. 1988). "[A]n accident is never present when a deliberate act is
12 performed." *Id.* (quoting *Unigard Mut. Ins. Co. v. Spokane Sch. Dist.* 81, 579 P.2d 1015
13 (Wash. Ct. App. 1978)). Even a deliberate act may be an accident, however, if "some
14 additional unexpected, independent and unforeseen happening occurs which produces or
15 brings about the result of injury or death." *Detweiler*, 751 P.2d at 284. In that case,
16 though, both the means and the result "must be unforeseen, involuntary, unexpected and
17 unusual." *Id.*

18 Moreover, in *Queen City Farms, Inc. v. Central National Insurance of Omaha*, the
19 Washington Supreme Court clarified the standard as applied to the negligent conduct that
20 is sometimes part of the damages resulting from intentional conduct. *See Allstate Ins.*
21 *Co. v. Jackson*, 2010 WL 1849076 at *3. It wrote, "[A]n objective standard is
22 inconsistent with insurance coverage for damage resulting from ordinary negligence."

1 | *Queen City Farms*, 882 P.2d at 713.² Similarly, in *Overton v. Consolidated Insurance*
2 | *Co.*, the court focused on another part of the standard insurance policy language defining
3 | “occurrence”—on whether damage was expected or intended rather than on the meaning
4 | of the term “accident”—and concluded that whether an event was expected and thus not
5 | an occurrence depends on “the subjective state of mind of the insured with respect to the
6 | property damage.”³ 38 P.3d 322, 325 (Wash. 2002).

7 The Washington Court of Appeals has applied this principle even more broadly.
8 | In *Nationwide Mutual Insurance Co. v. Hayles, Inc.*, it specified that, to be deliberate and
9 | thus not an accident, an intentional act must be “done with awareness of the implications
10 | or consequences of the act.” 150 P.3d 589, 593 (Wash. Ct. App. 2007). On the other
11 | hand, “[i]ntentional, wrongful acts will not qualify as accidents or ‘occurrences’ if the
12 | results could have been expected from the acts.” *Id.* (internal citation omitted).
13 | Similarly, although in dicta, the court in *Cle Elum Bowl, Inc. v. North Pacific Insurance*
14 | *Co., Inc.* required a subjective test in deciding whether there was an occurrence under a

15

16 ² The Washington Supreme Court also distinguished between the standard for
17 | determining the meaning of the word “accident” in the definition for “occurrence” and the
18 | standard for determining “expectation of the damages” in the definition of “occurrence.” 882
19 | P.2d 703, 714 (Wash. 1994). It concluded that its former holdings on whether an objective
20 | standard applies to whether there was an accident “does not control the question whether the
21 | expectation of injury or damage is to be decided under an objective or subjective standard.” *Id.*
22 | It then concluded “that a subjective standard applies” to the question whether “that injury or
23 | damage resulting from acts of negligence, even though precipitated by an intentional act, would
24 | be covered under the occurrence clause.” *Id.*

25 ³ The policy in *Overton* defined an “occurrence” as “an accident, including continuous or
26 | repeated exposure to conditions, which results in bodily injury or property damage neither
27 | expected nor intended from the standpoint of the insured.” 38 P.3d at 325.

1 policy with language identical to that here. 981 P.2d 872, 876 (1999). From the common
2 law requirement that an event be unexpected to be an accident, the *Cle Elum Bowl* court
3 concluded that “[w]hether or not an insured ‘expected’ a particular event is a subjective
4 test, requiring evidence of the insured’s state of mind.” *Id.* Based on the Washington
5 Supreme Court’s decision in *Queen City Farms*, the court in *Cle Elum Bowl* concluded
6 that the trial court had erred in deciding that the damage was not unexpected and
7 therefore not an occurrence. The court ultimately upheld the trial court’s decision,
8 however, because the damage “was clearly excluded by the policy.” *Id.*; *see also Indem.
9 Ins. Co. of N. Am. v. City of Tacoma*, 158 Wash. App. 1022 (Wash. Ct. App. 2010)
10 (unpublished decision), as corrected on denial of reconsideration (Feb. 10, 2011), *review
11 denied*, 257 P.3d 662 (Wash. 2011) (“In determining whether damage ‘unexpectedly and
12 unintentionally results[,]’ a subjective standard is applied based upon the state-of-mind of
13 the insured.”).

14 Furthermore, “the word ‘accident’ is but part of the definition of the broader term
15 ‘occurrence.’” *Yakima Cement Products Co. v. Great Am. Ins. Co.*, 608 P.2d 254, 257
16 (Wash. 1980). Beginning in 1966, standard insurance policy language was revised with
17 the “purpose of . . . broaden[ing] coverage.” *Queen City Farms, Inc. v. Cent. Nat. Ins.
18 Co. of Omaha*, 827 P.2d 1024, 1039 (Wash. Ct. App. 1992), *aff’d and remanded*, 882
19 P.2d 703 (Wash. 1994) (citation and quotations omitted). The word “occurrence”
20 replaced the word “accident” in standard insurance policy language, and an “occurrence”
21 was defined as “an accident, including continuous or repeated exposure to conditions,
22 which result in bodily injury or property damage neither expected nor intended from the

1 | standpoint of the insured.” *Id.* “The newer definition of occurrence and accident
2 | eliminates the need for an exact finding of the cause of damages so long as they are
3 | neither expected or intended from the standpoint of the insured.”⁴ *Id.*

4 | Accordingly, the words “occurrence” and “accident” “are not synonymous.” *Id.*
5 | “[A]ccident means something that must have come about or happened in a certain way,
6 | while occurrence means something that happened or came about in any way.” *Yakima*,
7 | 608 P.2d at 257 (quoting *Aerial Agr. Serv. Inc. v. Till*, 207 F. Supp. 50, 57-58 (N.D. Miss.
8 | 1962). Thus, “from the usual and ordinary meaning of the words used[,] the word
9 | ‘occurrence’ extends to events included within the term ‘accident’ and also to such
10 | conditions, not caused by accident, which may produce an injury not purposely or
11 | deliberately.” *Id.* (quoting *Aerial*, 207 F. Supp. at 57-58). Thus, “[t]he term ‘occurrence’
12 | has a meaning broader than ‘accident’ and may apply to a mishap which is negligent.
13 | However, it must nevertheless result in unintended consequences” for there to be an
14 | “occurrence” and thus coverage under the Homeowner’s Policy. *Palouse Seed Co.*, 697
15 | P.2d at 595.

16 |
17 | _____

18 | ⁴ See also *City of Medina v. Transamerica Ins. Co.*, 680 P.2d 69, 71 (Wash. Ct. App.
19 | 1984), abrogated on other grounds by *Queen City Farms, Inc. v. Cent. Nat. Ins. Co. of Omaha*,
20 | 882 P.2d 703 (Wash. 1994) (An occurrence is “an accident, including continuous or repeated
21 | exposure to conditions, which results in bodily injury or property damage neither expected nor
22 | intended from the standpoint of the insured”); *Palouse Seed Co. v. Aetna Ins. Co.*, 697 P.2d 593,
22 | 594 (Wash. Ct. App. 1985), abrogated by *Queen City Farms*, 882 P.2d 703 (“‘Occurrence’ is
22 | defined by the policy as ‘an accident, including continuous or repeated exposure to conditions,
22 | which results in bodily injury or property damage neither expected nor intended from the
22 | standpoint of the insured.’”).

1 Here, and in accord with the foregoing, the language in the Homeowner's Policy
2 and the PUP indicates that the word "occurrence" encompasses a broader range of events
3 than the word "accident." The Homeowner's Policy states that an occurrence
4 encompasses not just "an accident," but also "continuous or repeated exposure to . . .
5 harmful conditions."⁵ (Foley Dec., Ex. B at 3.) The PUP's broader language necessarily
6 includes some intentional action when it states that an occurrence includes "property
7 damage caused by an insured while *trying* to protect persons or property from injury or
8 damage." (Foley Dec., Ex. C. at 1-2 (emphasis added).)

9 In sum, the language in the contracts at issue indicates that "occurrence" has a
10 broader meaning than "accident." The standard language from which the contracts'
11 language was borrowed was introduced to broaden the meaning of "occurrence"—and
12 the conduct that would be covered under a policy—beyond that of "accident." *Queen*
13 *City Farms*, 827 P.2d at 1039. Moreover, the "practical and reasonable . . .
14 interpretation" of the term "occurrence," *Moeller*, 267 P.3d at 1002, is that given by the
15 court in *Yakima*, "something that happened or came about in any way." *Yakima*, 708
16 P.2d at 257 (citation and quotations omitted). Accidents, events, and conditions
17

18 ⁵ To the extent that the language in the Homeowner's Policy differs from the standard
19 insurance policy language, it would only make it easier for an event to be qualified as an
20 occurrence. The standard language states that an "occurrence" is "an accident, including
21 continuous or repeated exposure to conditions, which result in bodily injury or property damage
22 neither expected nor intended from the standpoint of the insured." *Queen City Farms*, 827 P.2d
at 1039. The language in the Homeowner's Policy, however, eliminates the requirement that the
damage be "neither expected nor intended from the standpoint of the insured." (Foley Dec., Ex.
B at 3.) This would only broaden the meaning of occurrence, not even requiring that the event
be unexpected.

1 constitute an “occurrence” so long as the resulting injury or damage is “neither expected
2 nor intended from the standpoint of the insured.” *Queen City Farms*, 827 P.2d at 1039.
3 Allstate has only addressed the issue of whether Hathaway’s conduct met the definition
4 of an accident; it has not submitted sufficient evidence to demonstrate that there is no
5 genuine issue as to the conduct under the “broader term ‘occurrence.’” *Yakima*, 608 P.2d
6 at 257.

7 Nevertheless, even if the court were to restrict the meaning of “occurrence” to that
8 of an “accident,” Allstate would not be entitled to summary judgment as a matter of law
9 under either the subjective or objective standards controlling the analysis of whether
10 conduct constitutes an “accident.” For Michael Hathaway’s actions to be intentional and
11 thus not an accident under the subjective standard, they must have been “deliberate,
12 meaning done with awareness of the implications or consequences of the act.” *Hayles*,
13 150 P.3d at 593. (Wash. Ct. App. 2007). His actions “will not qualify as accidents or
14 ‘occurrences’ if the results could have been expected from the acts.” *Id.* (internal citation
15 omitted). The Strands conceded that Hathaway entered the property and caused the trees
16 to be cut down, (Strand Ans. ¶ 13.) which were intentional acts. As this court concluded
17 in *Jackson*, however, under Washington State law “it is clear that the term ‘accident’
18 encompasses some intentional acts that result in unintended losses or consequences.”
19 2010 WL 1849076 at *4.

20 Here, there is insufficient evidence in the record to demonstrate that Michael
21 Hathaway was “aware[] of the implications or consequences of” his actions, or that all
22 the damages from the tree cutting “could have been expected from [his] acts.” *Hayles*,

1 150 P.3d at 593. Allstate relies on the Hathaways' answer to the Strands' complaint in
2 Snohomish County Superior Court to argue that there is no dispute as to material facts.
3 (Reply to SJ Mot. (Dkt. # 27) at 5.) Allstate argues that the admissions demonstrate that
4 Michael Hathaway removed some trees, that he was a participant in the permit process
5 with the City of Edmonds, that he was aware that the permit to remove trees had been
6 denied in a "permit conditions not satisfied" letter, and that the trees were in an
7 environmentally sensitive area. (*Id.*) Looking at their answer in the Snohomish County
8 action, the Hathaways admit the terms of the letter from the City of Edmonds (but deny
9 any allegations inconsistent with the terms of that letter), that "Michael Hathaway caused
10 individuals to enter [the Strands'] property who removed certain trees," that he had been
11 advised he could not remove the trees without a permit, and that the trees were in an area
12 designated in the City code "under certain descriptions." (Vasquez Decl., Ex. 1 (Dkt.
13 #26-1) at 2.) Whether the admissions in the answer demonstrate the conclusions asserted
14 by Allstate is a question of fact that must be resolved by a jury. Moreover, these facts do
15 not demonstrate that there is no question of fact whether Hathaway could have expected
16 that damage would result to the Strand home or to the hillside. Viewing the evidence in
17 the light most favorable to the non-moving party, Allstate has not demonstrated that there
18 is no genuine dispute of material fact whether the damage to the Strand home or to the
19 hillside "could have been expected from [Michael Hathaway's] acts." *Hayles*, 150 P.3d
20 at 593.

21 Even under the objective standard, Allstate would not be entitled to summary
22 judgment. Under that standard, even a deliberate act may be an accident if "some

1 additional unexpected, independent and unforeseen happening occurs which produces or
2 brings about the result of injury or death.” *Detweiler*, 751 P.2d at 284. In *Jackson*,
3 where Jackson intentionally engaged in a gun trade that led to another’s death, the court
4 concluded that the use of the gun was an “additional unexpected, independent and
5 unforeseen happening.” 2010 WL 1849076 at *4. Even in *Detweiler*, where the court
6 stated that it was “arguable that claimant’s injuries were a natural consequence of his
7 actions” when he intentionally fired his gun at a moving vehicle and was struck by the
8 resulting shrapnel, the court concluded that it would be improper to grant summary
9 judgment because “reasonable minds could disagree as to whether under the
10 circumstances what happened was an additional, unexpected, independent and unforeseen
11 happening.” 751 P.2d at 286-87 (internal citations and quotations omitted). Similarly, in
12 *State Farm Fire and Casualty Co. v. Ham and Rye, LLC*, the court stated that a jury had
13 to decide whether damage to a building was so reasonably foreseeable that it was not an
14 occurrence when a fire later spread from newspapers the insured had lit, and
15 unknowingly failed to put out, on the sidewalk by the building. 174 P.3d 1175, 1181
16 (Wash. Ct. App. 2007).

17 Allstate relies on the evidence discussed above in arguing that the damage to the
18 Strand home and the hillside “was not unforeseen or unexpected.” (Reply to SJ Mot. at
19 5). As discussed above, whether the admissions in the Hathaways’ answer to the Strands’
20 lawsuit demonstrate the conclusions asserted by Allstate is a question of fact to be
21 resolved by a jury. Moreover, those facts do not demonstrate that there is no question of
22 fact whether the damage to the Strand home or to the hillside would be unforeseen or

1 unexpected under the objective standard. Viewing the evidence in the light most
2 favorable to the nonmoving party, Allstate has not demonstrated that there is no genuine
3 issue of material fact as to whether the damage to the Strand home and to the hillside was
4 not “unforeseen, involuntary, unexpected and unusual.” *Id.* Allstate is not entitled to
5 summary judgment as a matter of law that the losses were not covered by the policy
6 because they were not an occurrence.

7 **D. Exclusion**

8 “The insurer . . . must show that the claim of loss is excluded.” *Nw. Bedding Co.*,
9 225 P.3d at 487. Allstate here argues that the losses are not covered because they fall
10 under the policies’ exclusions for intentional activity. (SJ Mot. at 18.) The Strands argue
11 that if there is an occurrence, then the exclusion for intentional activity does not apply.
12 (Response to SJ Mot. at 14.)

13 The Washington Supreme Court has held that “exclusions from coverage of
14 insurance are contrary to the fundamental protective purpose of insurance and will not be
15 extended beyond their clear and unequivocal meaning.” *Stuart v. Am. States Ins. Co.*,
16 953 P.2d 462, 464 (Wash. 1998). It has also concluded that “[e]xclusions should . . . be
17 strictly construed against the insurer.” *Id.*

18 The Homeowner’s Policy excludes coverage for “property damage intended by, or
19 which may be reasonably be expected to result from the intentional . . . acts or omissions
20 of, any insured person.” (Foley Dec., Ex. B at 22.) Similarly, the PUP states that the
21 “policy will not apply to any intentionally harmful act . . . of an insured.” (Foley Dec.,
22 Ex. C at 5-6.)

1 The Washington Supreme Court has concluded that a subjective standard applies
2 to “expectation of harm” and “expectation of damages.” *Queen City Farms*, 882 P.2d at
3 714. The Washington Court of Appeals explained that the word “expected,” in this
4 context, “carries the connotation of a high degree of certainty or probability.” *Queen City*
5 *Farms*, 827 P.2d at 1036 (internal citations and quotations omitted).

6 In arguing that coverage is denied by the Homeowner’s Policy’s exclusion for
7 intentional action, Allstate relies on the admission that Hathaway cut down the trees.
8 (Reply to SJ Mot. at 10-11.) As Allstate argues, the record establishes that Michael
9 Hathaway acted intentionally in cutting down the trees. (Amended Compl. ¶ 13; Strand
10 Ans. ¶ 13). Nevertheless, the Homeowner’s Policy’s exclusion for intentional action
11 nonetheless covers intentional action under certain circumstances. To show that coverage
12 is excluded, Allstate must demonstrate that the damage could not “reasonably be
13 expected to result from the [insured’s] intentional . . . acts.” As discussed above, the
14 evidence relied upon by Allstate does not demonstrate that there is no question of fact
15 whether the damage to the Strand home or to the hillside could have been foreseen or
16 expected. Viewing the evidence in the light most favorable to the nonmoving party,
17 Allstate has not demonstrated that Hathaway expected, with “a high degree of certainty or
18 probability,” *Queen City Farms*, 827 P.2d at 1036, that the trees would damage the
19 Strand home or that cutting the trees would result in damage to the hillside.

20 Similarly, viewing the evidence in the light most favorable to the nonmoving
21 party, Allstate has not demonstrated that Michael Hathaway’s actions are excluded under
22 the PUP, which does not cover damage for an “intentionally harmful act.” While

1 Hathaway intentionally cut down the trees, the record does not demonstrate that he
2 intended to harm the home or the hillside. Allstate has failed to demonstrate that there is
3 no genuine dispute as to any material fact and that it is therefore entitled to summary
4 judgment as a matter of law.

5 **IV. CONCLUSION**

6 For the reasons stated above, the court DENIES Allstate's motion for summary
7 judgment (Dkt. # 21).

8 Dated this 4th day of June, 2012.

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12 The Honorable James L. Robart
13 U.S. District Court Judge
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